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BAD WITCHES: A CUT ON THE CLITORIS WITH THE INSTRUMENTS OF INSTITUTIONAL POWER AND POLITICS

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I. INTRODUCTION

> "One 'fictions' history on the basis of a political reality that makes it true, one 'fictions' a politics not yet in existence on the basis of a historical truth."[1]

Little did I know what was in store for me when I purchased Alice Walker's novel, *Possessing the Secret of Joy*.[2] I knew only that the author of *The Color Purple*[3] had a new book in bookstores and that I was eager to read what she had to say.[4] In a capsule, after experiencing sexual orgasm as an adolescent, the heroine's subsequent genital mutilation permanently obliterates her orgasm ability, and she slowly goes mad as a consequence.[5] My capsule, however, is nowhere close to the pain and suffering captured by Walker's novel. I felt personally assaulted at the conclusion of the book. That novel became the catalyst for my thoughts on the subject as I mused about the reality of female genital mutilation, in fact, genital butchery.

This Article is about a case that, at this writing, does not exist. Assume safely, however, that the factual situation comprising the "what happened?" occurs. It is only a matter of time before an advance sheet of a law reporter drops the proverbial shoe. We must, therefore, "fiction[] a politics not yet in existence on the basis of a historical truth,"[6] and thereby cause our fiction to gain political-reality status as law.

As best as we can know into the future, what jurisprudence will emerge from litigation wherein a guardian of a girl child or a young adult woman sues each of her parents, the medical personnel involved, and members of her extended family in civil litigation for subjecting her to female circumcision as a minor? This question is a two-sided coin. One side raises the question of whether the parental immunity doctrine of the different states should be preempted at a national level

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1 MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 193 (1980).

2 ALICE WALKER, POSSESSING THE SECRET OF JOY (1993).

3 ALICE WALKER, THE COLOR PURPLE (1982).

4 Alice Walker's writings as a novelist invariably penetrate human facades to make insightful political statements.

5 WALKER, *supra* note 2.

6 FOUCAULT, *supra* note 1, at 193.

with legislation that favors the girl in its provisions for a civil remedy in instances of female genital mutilation (hereinafter "FGM"). The other side of the coin raises the question of whether parental custom, tradition, and/or religion should be favored by allowing parents the final word on whether their female children will be circumcised. I argue for national legislation that favors the girls. Therefore, it is United States politics on female circumcision that I seek to fiction, because politics will ultimately determine any emerging jurisprudence on this subject.

The narratives in the Article, stories told by the girls or about them, will show the constitutive jurisprudence school of thought at work in the form of custom and tradition. These thoughts are as powerful in the psyche of a people as the Bill of Rights for Americans. What the inevitable case will present is an emerging jurisprudence on a clash of rights.

> She is only 15. Pregnancy was supposed to have been physically impossible; when she was just a little girl in Somalia, elders with sharp instruments and makeshift sutures and herbal potions had supposedly assured that.
>
> She went into labor about 9 in the morning. Her water broke about 11. So when she got to the hospital at about 4 p.m., she was quite far along. Doctors looked between her legs and gasped. . . .They'd never seen such a thing, they said. What was it? How did it open? Throughout the delivery, the attending physician kept a pair of scissors in her hand, snipping here and there around the thick, unyielding keloid scarring characteristic of people of African ancestry. Her sister said she was no expert, but that at home they cut upward and sideways. No, that can't be so, the doctors told her. When the baby's head finally ripped through, the new mother was a pitiable, jagged wound. It took an hour and a half to sew her back up. That is when she lost it. Though she had shown courage and stoicism that belied both her age and her terror, repeated injections of painkillers could not stop her screaming.
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> In her sister's suburban Washington [D.C.] apartment, the Somali student slowly recovered, and she has since returned to her country, her genitals sewn shut again by American doctors, at her request . . . .[7]

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[7] Miller Bashir, *Female Genital Mutilation in the U.S.: An Examination of Criminal and Asylum Law*, 4 AM. U.J. GENDER & LAW 415-16 (1996).

Female circumcision, a mildly gruesome name for a genuinely malefic practice, ranges in degree from a slight clipping away of the clitoris to an excision of all external genitalia. Excision procedures usually result in a subsequent stitching together of the remaining raw bodily flesh.[8] I propose to justify and create a national jurisprudence that, in addition to its preemptive nature, defines FGM as sexual abuse, provides a uniform remedy for mutilation victims, and allows for civil damages.

As colleagues will do in the academy, my colleagues asked me the routine question, "What are you working on?" I have always understood the question to mean, "What are you writing or researching?" The look of horror on each of their faces portrayed both repulsion and sympathy when I answered, "Female genital mutilation." If we are horrified and repulsed with only the thought of the practice, consider the mental and psychological pain of female babies, youth, and young adult women who actually experience the mutilation and survive to live for the remainder of their lives in a mutilated condition.

According to Efua Dorkenoo, author of the book *Cutting The Rose*,[9] a substantial majority of the United States population lives totally unaware of the ritualistic practice. Dorkenoo states,

> The historical and social context of female genital mutilation is barely understood in western countries. Very few white people know that clitoridectomy is not exclusive to black cultures but has been performed on white women in the past – not as a precondition for marriage but as 'treatment' for misbehaviour. Except in gender studies and in feminist circles, such information is generally hidden. FGM is seen by the mainstream white population as something totally alien to white culture.[10]

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8 ANNE CLOUDSLEY, WOMEN OF OMDURMAN, LIFE, LOVE, AND THE CULT OF VIRGINITY 101 (1983). *See also* EFUA DORKENOO, CUTTING THE ROSE 5 (1994).

9 DORKENOO, *supra* note 8.

10 *Id.* at 134. Dorkenoo continues,
Knowledge that FGM is practised by some black people on girls provokes racist remarks or paternalism towards the people who practise it. Many black people have confused FGM as gender oppression with the rich African culture, and because they look to their African heritage with pride, racist remarks on FGM can evoke strong sentiments of cultural nationalism. Racist remarks have the effect of putting many black people on the defensive about FGM. Racists remarks also trigger guilt feelings in liberal whites who may mean well but confuse the whole issue by condoning FGM within a naive concept of multi-culturalism. Specifically, African women campaigning against FGM in the West have the triple

Genital mutilation of girl children, however, is a child protection issue. The practice in its actions defines itself as sexual abuse. Its prevention in the United States deserves, therefore, a place on the mainstream child health and child protection agenda.[11]

Part II of this Article provides a brief description of FGM, both presently and historically, including the history of the practice in the United States and in countries where it continues. Part III argues for entitlements that override the potential defense of FGM as a type of practice within the parental immunity doctrine, and hold all participants in the practice responsible and liable for damages in a civil action. My analysis in Part IV accepts Michel Foucault's[12] and Steven Winter's[13] definitions of "institutions"[14] as correct, and adds my own interpretation. Part IV theorizes that institutions are always political in nature, therefore, always powerful and that both Foucault's and Winter's theories of power perfectly fit the actions of the "bad witches" in this Article, the persons who continue to perpetuate the practice. Part V's analysis is of the religious, moral, and political institutional claims of FGM. Part VI urges the prescription of a national institutional will that acts to pass preemptive legislation holding all participants in the practice of FGM answerable in a civil action for damages. I use Cass Sunstein's thesis of "incompletely theorized agreements"[15] in Part VI because it works well in this Article to demonstrate a way of bringing divergent value systems together for this particular legislation. Around this one item of potential legislation, abortion right advocates, pro-choice and pro-life, "surrogacy for a fee" supporters and non-

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> burden of having to confront gender oppression, white liberal guilt and racism within the community. . . .
>
> People who are keen to do something are often paralyzed into inaction. . . . To avoid confronting the pain of criticism, many policy-makers, professionals, funders and women leaders rationalize that it is better to leave the solution to women within the community and argue that FGM is too sensitive an issue for them to deal with. As has been already explained, however, in most cases those particular women are powerless to confront FGM alone.

Id. at 134-35.

11 *Id.* at 125.

12 FOUCAULT, *supra* note 1, at 197-98.

13 Steven L. Winter, *The Power Thing*, 82 VA. L. REV. 775 (1996).

14 FOUCAULT, *supra* note 1, at 197-98; *See also* Winter, *supra* note 13, at 775.

15 CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (1996).

supporters, and other supporters and non-supporters on particular issues in feminist theory can perhaps coalesce in agreement.

II. DESCRIPTION

"O woe is nature that she did not connect pregnancy to orgasm."[16]

A. Present Status

Primarily, existing legal academy research and writing on FGM concern the immigration issue of political asylum sought by women who desire a safe harbor in the United States.[17] Some immigrant women allege that they will undergo FGM if they return to their home country.[18] It seems to me that scholars working on the immigration issue have it right and will continue to work in the area until they achieve their goal that political asylum should be granted the women. Therefore, my contribution to the existing discourse will focus exclusively on girls who were born in this country, are citizens of the United States and are being reared in this country. There is also a body of research that evaluates FGM for its rightness or wrongness as a moral question. My contribution to the moral argument will be found Part IV's analysis of institutional power.

"Second-generation black girls are growing up in a Western environment where the definition of womanhood is not linked to mutilation of the erogenous zones of the female sexual organs."[19] These girls live within the culture of the United States as citizens; therefore, for them, the cushion of reinforcing institutions, such as those that exist in the practice's source countries, are not available as powerful tradition and custom in western environments. In the United States, there are no "rite of passage" celebrations. A woman's "bride price" fails to increase because her external genitalia have been excised. In fact, very much like the Sudanese man who divorced his Egyptian wife after she allowed her mutilation,[20]

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16 This statement is not original to me. I would like to give credit to whomever originated it. I believe I heard someone say it and I cannot remember who it was.

17 *See generally* Bashir, *supra* note 7. *See also infra* notes 19-21.

18 *Id.*

19 DORKENOO, *supra* note 8, at 124.

20 CLOUDSLEY, *supra* note 8, at 118-19.

men who have been reared in a western environment might well be repulsed by the surgery.[21]

This is not to say that western world countries do not ascribe to gender roles and rituals. It is simply that the western world countries reinforce gender roles through a set of mechanisms and institutions that are different from FGM.[22]

"The implications of FGM for the mental health of girls living in the Western world have not been studied."[23] Dorkenoo reports on the counseling of several young women who face physical, psychological and psycho-sexual problems as

> a direct consequence of FGM, some of whom stressed that they do not feel 'whole', and are not 'proper women.' This, in turn, has had an impact on their self-confidence and their relationships with men. For example, some women have said that, because of lack of sensation, they feel that they are abused each time they have sexual intercourse.[24]

FGM wrings emotion from ordinarily calm persons when they become participants in any discussion about the issue in the western world.[25]

A genitally mutilated girl lives in a sexual vacuum as a woman. She is not necessarily condemned to a lifetime of severe pain, but definitely left to live a lifetime without sexual pleasure and with some amount of physical discomfort that may eventually result in death.[26] The practice exists as a religious ritual in some

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21 RAQIYA HAJI DUALEH ABDALLA, SISTERS IN AFFLICTION: CIRCUMCISION AND INFIBULATION OF WOMEN IN AFRICA 82 (1982). "Even if they do not traditionally circumcise women, the evilness of sex and the dangers of women were carried over into the mainstream of Western thought and Western medical science." *Id.*

22 It is not that the western world countries are innocent of sexual and gender politics. The western world countries simply package their gender mutilation differently.

23 DORKENOO, *supra* note 8, at 124.

24 *Id.* at 124-25.

25 "FGM is a very emotive issue in the Western world." *Id.* at 126.

26 *See generally* Stephanie Kaye Pell, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear An Onslaught of Asylum Claims*, 20 N.C.J. INT'L L. & COM. REG. 655 (1995). Pell's article recounts episodes of pain and raw sores in women who have experienced genital mutilation. *See also* Fitnat Naa-Adjeley Adjetey, *Reclaiming the African Woman's Individuality: The Struggle Between Women's Reproductive Autonomy and*

countries, a cultural heritage in others,[27] and finds its way into the United States with persons who come into the country unwilling to put aside their rituals or their culture. "They bring with them their children and their customs."[28]

Bringing one's heritage along with migration seems reasonable, and this country's accommodation of both migratory rituals and heritage seems appropriate. A fundamentally liberal democracy generally accommodates and moves on to other agendas, sometimes assimilating with the migrator's culture. Female circumcision, however, attacks the general well-being and health of young girls. Under no circumstances should we accommodate the practice to any degree. *It is at this point that a clash of rights occurs.* To what extent does the acceptance of the application for immigration express an acceptance of the host country's value system and thereby relinquish rights considered automatic in the country from which one is migrating?

FGM often kills its victim almost instantly because of hemorrhaging or later because of a resulting infection. Both Great Britain and France have passed parliamentary acts prohibiting female circumcision under any circumstances.[29] This, however, is not so in the United States, where our national legislation created an exception.

Congress noted the following findings in passing legislation that targets persons who perform the genital mutilation on females under eighteen years of age:

African Society and Culture, 44 AM. U. L. REV. 1351 (1995):

> The short-term effects of FGM are acute pain, post operative shock, urine retention, and bladder infection resulting from lacerations of the bladder, the anal sphincter, urethra, vaginal walls, and Bartholins glands. In addition, FGM may result in hemorrhaging, tetanus, septicemia and infection that could lead to death, and vulva abscesses. Some of the long-term effects of FGM include keloid formation, infertility, chronic infections of the uterus and vagina, incontinence, painful sexual intercourse (dyspareunia), retention of blood, painful menstrual periods (dysmenorrhea), growth of implantation dermoid cysts, fistula formation, and obstructed childbirth.

Id. at 1362 (footnotes omitted).

27 Daliah Settareh, *Women Escaping Genital Mutilation – Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123 (1995) (footnotes omitted). "Today, girls and women in many parts of Africa, the Arabian Peninsula, the Middle East, India, and East Asia are genitally mutilated. The State Department [of the United States] estimated that up to 110 million girls and women worldwide have already suffered from genital mutilation." *Id.*

28 Bashir, *supra* note 7, at 416 (footnotes omitted).

29 *See* DORKENOO, supra note 8, at 126-27.

> (1) the practice of female genital mutilation is carried out by members of certain cultural and religious groups within the United States;
> (2) the practice of female genital mutilation often results in the occurrence of physical and psychological health effects that harm the women involved;
> (3) such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional;
> (4) the unique circumstances surrounding the practice of female genital mutilation place it beyond the ability of any single State or local jurisdiction to control.
> (5) the practice of female genital mutilation can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law; and
> (6) Congress has the affirmative power under section 8 of article I, the necessary and proper clause, section 5 of the fourteenth Amendment, as well as under the treaty clause, to the Constitution to enact such legislation.[30]

With these findings, I continue to ponder the question of why create an exception? The answer probably denotes institutional politics and the political game of power. The text of the legislation that became law tucked away, no less, in an *appropriations* bill reads,

> § 116. Female genital mutilation
> (a) Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.

Then comes the exception:

> (b) A surgical operation is not a violation of this section if the operation is –

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30 DORKENOO, *supra* note 8, at 126.

> (1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner.[31]

These subsections can be read as validating circumcision if it is necessary to the female's psychological health because without an excision of her genitalia she will be ostracized in her cultural community. The exception continues by stating,

> (2) [or] performed on a person in labor or who has just given birth and is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife.[32]

This subsection seems to imply the exception that for girls under 18, if they are impregnated, wait until labor and, albeit, tardily perform the surgical procedure. The "training to become a midwife" exception allows virtually anyone to perform the procedure at the time of childbirth.

> (c) In applying any subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual.[33]

The legislation fails to mention parents, fails to provide a civil remedy that must be responded to in damages, and fails to ban the practice without exception. I write this Article as an emissary from the camp of the young girls who have experienced FGM or face the experience with terror. As Dorkenoo points out, "In the USA in September 1994, . . . the case [arose] of an Eritean father in California who was so concerned that his three-year-old daughter was becoming sexually precocious that he had carried out a clitoridectomy on her himself."[34] From the girls' perspective, Title Eighteen, Section 116(b) of the United States Code serves only to reopen a door that Section (a) of the legislation closes. Also, the version of

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31 18 U.S.C. §116(a)(b)(1) (1996).

32 *Id.* §116(b)(2).

33 *Id.* §116(c).

34 DORKENOO, *supra* note 8, at 125.

the act that Congress ultimately enacted fails to include the public education provision that was contained in an earlier version.[35]

Because "[h]ealth care emergencies confirm that FGM is being practised on children in the West,"[36] the deleted public education section continues to be crucially important.[37] So, what can we do? We can cause enactment of legislation

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35 *See* Bashir, *supra* note 7, at 432. "Representative Patricia Schroeder first introduced the 'Federal Prohibition of Female Mutilation Act of 1995' on February 14, 1995 to the United States Congress." *Id.*

36 *Id.* at 127.

> For example, in France in 1982, the three-month-old daughter of Malian parents bled to death as the result of a botched excision performed by a traditional excisor. The dead child's parents were charged with criminal negligence and they were given suspended sentences. In the same year another three-month-old baby was brought to a Paris emergency hospital, bleeding after her Malian father, a migrant worker, had removed her clitoris with a pocket knife. Three other babies have bled to death.... In Australia in 1993 two girls under two years old were found to be infibulated.

Id. at 127-28.

37 In 1997 Congress provided for information on FGM to be made available to all aliens coming into the United States as immigrants from countries known to practice the mutilation. The provision does not ensure that girls who are already in the country will receive any form of information. The information provision can be found at 8 U.S.C. § 1374 (1996). Section 1374 reads as follows:

> § 1374. Information regarding female genital mutilation
> (a) Provision of information regarding female genital mutilation
>
> The Immigration and Naturalization Service (in cooperation with the Department of State) shall make available for all aliens who are issued immigrant or nonimmigrant visas, prior to or at the time of entry into the United States, the following information:
>
> (1) Information on the severe harm to physical and psychological health caused by female genital mutilation which is compiled and presented in a manner which is limited to the practice itself and respectful to the cultural values of the societies in which such practice takes place.
> (2) Information concerning potential legal consequences in the United States for (A) performing female genital mutilation, or (B) allowing a child under his or her care to be subjected to female genital mutilation, under criminal or child protection statues or as a form of child abuse.
>
> (b) Limitation
> In consultation with the Secretary of State, the Commissioner of Immigration and Naturalization shall identify those countries in which female genital mutilation is commonly practiced and, to the extent practicable, limit the provision of information under subsection (a) of this section to aliens from such countries.
> (c) "Female genital mutilation" defined

that includes parents and family members in its provisions, specifies a civil damage remedy, and includes educational and research provisions. As Dorkenoo states, "the girl child has the right to live with her family and to enjoy the best of the culture of its community, but without fear of being genitally mutilated."[38]

We can also ask questions such as the following that clearly reveal the power/political axis of FGM: (1) Is this a religious question?; (2) Is this a moral question?; (3) Is this a political question? The questions and their answers provide important directional signposts by identifying potential arguments that make a case for parents who subject their daughters to the mutilation. The questions and their answers also identify existing substantive doctrine that can be extrapolated to make a stronger case in opposition to the practice.

B. In a Nutshell: A Historically Pernicious Paradigm

Female sexuality threatens the rational mind. Otherwise, why would apparently sane and reasonable people affirm the biological function of pregnancy while simultaneously suppressing, permanently,[39] a woman's biological experience of sexual pleasure?[40] "There are several forms of FGM which may vary in severity but always results in irreversible damage to the clitoris and the consequent loss of

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> For purposes of this section, the term "female genital mutilation" means the removal or infibulation (or both) of the whole or part of the clitoris, the labia minora or labia majora.

Id.

38 DORKENOO, *supra* note 8, at 126.

39 "There is no surgical technique capable of repairing a clitoridectomy, or of restoring the erogenous sensitivity of the amputated area." DORKENOO, *supra* note 8, at 20.

40 Hanny Lightfoot-Klein points to a survey of circumcised women who reported a substantial reduction in their sexual pleasure:

> Koso-Thomas . . . reports that she interviewed 50 urban women . . . who had had sexual experience before circumcision. She found that none of these women were able to reach the level of satisfaction they had known before circumcision, and were unaware before the interview that this deficiency was a result of circumcision. During these interviews [Koso-Thomas] was told of women who had striven to find the ideal partner through trial and error until they had lost their husband and their homes.

HANNY LIGHTFOOT-KLEIN, PRISONERS OF RITUAL 40-41 (1989). *See also* CLOUDSLEY, *supra* note 8, at 120-21.

tactile sensation and ability to achieve orgasm. [It] would only be similar to male circumcision if the penis were amputated."[41]

A working definition of FGM must be set out here so that this Article establishes a common understanding of the subject matter under discussion. As I see it, only practitioners of the nefarious engage in the mutilation described below:

> There is growing evidence that wide variations of mutilation are performed on the normal female vulva in different countries but that they have been classified in different ways over the years. There is a need for standardization in this area but in its absence the following categories are presented:
>
> 1. A. Circumcision, or the removal of the prepuce or hood of the clitoris. Circumcision is the mildest type of mutilation and affects only a small proportion of the millions of women concerned. It is the type of mutilation which can correctly be called circumcision and could be described as equivalent to male circumcision, but there has been a tendency to group all kinds of mutilations under the misleading term "female circumcision." Biologically, the male equivalent of mutilation beyond circumcision as described would be various degrees of penisectomy – removal of the male sexual organ.[42]
>
> B. *Sunna.* The Arabic word *sunna* means "tradition" and the term *sunna* circumcision should only be applied to removal of the prepuce. (For some years, all forms of female circumcision except this have been prohibited in Egypt and the Sudan. In 1967 this too was declared illegal in Egypt, but it is still done.) *Sunna* is the form advocated by all authorities on Islam where the people refuse to abstain. [43]
>
> Female circumcision, partial clitoridectomy, total clitoridectomy and cuts into the clitoris and even intermediate infibulation are sometimes referred to as "*sunna*" (tradition) by Muslims. Because of the variation in the types of FGM under the term "*sunna circumcision*," it is important to check precisely what

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41 Bashir, *supra* note 7, at 420 (footnotes omitted).

42 DORKENOO, *supra* note 8, at 5.

43 CLOUDSLEY, *supra* note 8, at 110.

people are referring to when they use the term to describe female genital mutilation.[44]

2. Excision, meaning partial or total cutting of the clitoris and all or part of the labia minora. In some cases the labia majora are removed but with no stitching. Excision is the most widespread type of mutilation. Approximately 80 percent of those affected undergo excision.

3. Infibulation, the cutting of the clitoris, labia minora and at the least the anterior two-thirds and often the whole of the medical part of the labia majora. The two sides of the vulva are then pinned together by silk or catgut sutures, or thorns, thus obliterating the vaginal introitus except for a small opening, preserved by the insertion of a tiny piece of wood or reed for the passage of urine or menstrual blood. The girl's legs are then bound together from hip to ankle and she is kept immobile for up to forty days to permit the formation of scar tissue. In some communities there is no stitching but, to facilitate healing, the raw edges of the wound are brought together by adhesive substances such as eggs, sugar or acacia tar and the girl is kept immobile. . . .

4. Intermediate infibulation entails different forms of mutilation followed by variable degrees of stitching. In one type the clitoris is removed and the surface of the labia minora roughened to allow stitching. In other types, the clitoris is left intact but the labia minora are removed. The insides of the labia majora are removed and stitched with the clitoris buried underneath.

5. Unclassified. These include scarification of the clitoral prepuce, cuts into the clitoris and labia minora as well as into the vagina, for example *gishiri* cuts (as practiced in parts of northern Nigeria) and hymenectomy.[45]

Instruments of the procedure include knives, razor blades, pieces of glass or scissors in countries where the mutilations occur without benefit of hospital sanitation or that of a physician's office.[46] There are reports of fingernails having

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44 DORKENOO, *supra* note 8, at 8.

45 *Id.* at 5-8.

46 *Id.* at 8.

been used "to pluck out the clitoris of babies."[47] Clearly, this country must exert additional effort in the area of public education.

Who performs these procedures? Mostly women.[48] And to state the obvious, some girls die from these procedures, either from bleeding to death or from massive infections that follow the cutting.[49] The following story is not unusual:

> When I had the operation I was eight years old. I was taken back to Somalia and I had the operation performed. Because I was very young I did not know what was happening to me, what they were doing to me. They strip you. They open your legs apart and they have ladies holding every part of your body, even holding your mouth to prevent you from screaming. I still remember the pain to this day. My sister was circumcised first and straight after she was done I was done. In terms of what has happened to us, we just use the term being 'sewn up', having the clitoris cut off and having been sewn up for us not to have any sexual intercourse or anything! I questioned my mother as to why she did it to me. She said she had to – that it is tradition, it is custom. Anyhow she said she was pressurized into it by grandparents and relatives. And I told her that we were her daughters and we could have died having this operation. The day before I was circumcised, a girl died in the next village and I still remember that. I said to her, you are risking your daughters' lives for the satisfaction of men. When it is my turn to get married I will have to go to [the] hospital to have the operation undone. I feel whoever I marry, I do not want him to marry me because I am circumcised. For me, I feel my body has been used for somebody else. What is the point of all this except to cause me a lot of pain?[50]

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47 *Id.*

48 LIGHTFOOT-KLEIN, *supra* note 40, at 36. *See also* DORKENOO, *supra* note 8, at 8. Most frequently, the operations are performed by a traditional birth attendant, called the *Daya* in Egypt and the Sudan. In Somalia excisors are from the *midgan* clan. In northern Nigeria, Egypt and Nigeria, male barbers also carry out the task, but usually it is done by a woman; rarely by the mother. In Mali, Senegal and the Gambia it is traditionally carried out by a woman . . . .

Id.

49 ALICE WALKER AND PRATIBHA PARMAR, WARRIOR MARKS (1993).

50 DORKENOO, *supra* note 8, at 123.

> According to four . . . studies, the primary reasons for performing FGM include the following: meeting a religious requirement; preserving group identity; protecting virginity and family honor by preventing immorality; helping to maintain cleanliness and health; and furthering marriage goals, including greater sexual pleasure for men.[51]

Some think Egypt to be the place of FGM's origin.[52] The practice is thought to have spread through Africa by early travel along the north-south and east-west caravan routes in Africa, and through the slave trade routes.[53] Although FGM was initially thought to exist only in African and Asian countries,[54] the practice had its adherents in France, Great Britain and the United States.[55] "Female genital mutilation is practiced in more than thirty Asian countries. . . . While most girls are mutilated between the ages of four and ten, the age can range from a newborn to a woman on her wedding night to a mother who has given birth to her first child."[56]

In Europe, "[t]he earliest mention of clitoridectomy in the 19th century was in Berlin in 1822. . . . By the 1890s, some French physicians were not only removing the clitoris but amputating the labia minora, as well. But the reaction against this surgery was so strong in France that it was prohibited by law."[57]

England was "the only country in Europe where clitoridectomy took hold on a large scale . . . ."[58] One surgeon, Isaac Baker Brown, considered to be one of the ablest and most innovative gynecological surgeons in England, claimed to have invented clitoridectomy."[59] In the nine-year operation of the private hospital

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51 Bashir, *supra* note 7, at 424 (footnotes omitted).

52 CLOUDSLEY, *supra* note 8, at 101.

53 *Id.* at 112.

54 "Female genital mutilation (FGM) is a cultural practice performed in many African and some Asian countries on girls and young women . . . ." Bashir, *supra* note 7, at 416.

55 EDWARD WALLERSTEIN, CIRCUMCISION: AN AMERICAN HEALTH FALLACY 172 (1980).

56 Bashir, *supra* note 7, at 419 (footnotes omitted).

57 WALLERSTEIN, *supra* note 55, at 172.

58 *Id.*

59 *Id.* at 172-73.

founded by the surgeon, "it is possible that several hundred, or perhaps several thousand, such surgeries were performed."[60] One gynecologist said the surgery was performed "in an enormous number of cases . . . ."[61]

> American physicians not only adopted clitoridectomy for many years, they embellished it. By the early 1870s, two noted American surgeons . . . combined clitoridectomy with oophorectomy (removal of the ovaries). There are no records of the number of such clitoris-ovary operations performed in the 1870s; the figure is likely in the thousands. Although the combined clitoris-ovary removal surgery was largely discontinued by 1880, clitoridectomy continued on a large scale until the 1890s. Its popularity finally ceased about 1910, because it failed to cure the 'diseases' of hypersexuality and masturbation. . . . [T]he 1940 *Roman Catholic Manual for Confessors* recommended cauterization or amputation of the clitoris as a cure for 'the vice of lesbianism.'[62]

There are reports that in the United States "[f]emale circumcision came into use in the late 1880s and was widely employed up to 1937."[63] There is speculation that the surgery still exists in the United States, but has gone underground.[64] In his

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60 *Id.* at 173.

61 In 1866, Dr. Brown published a volume entitled *The Curability of Certain Forms of Insanity, Epilepsy, Catalepsy and Hysteria in Females.* The volume caused the British medical establishment to engage in heated debate with Brown wherein clitoridectomy was labeled "quackery" and Brown's claimed cures were labeled bogus. "Ultimately, Brown was expelled as a Fellow of the Obstetrical Society and forced to resign as President of the London Medical Society." *Id.*

62 *Id.* at 174.
> It is important to contrast the use of clitoridectomy in England and the Continent with its use in the United States. In all other countries the use was short-lived; in the United States the surgery was in vogue for almost 50 years. No other country compounded the horror by removing the ovaries.

Id.

63 *Id.* at 175.

64 Such surgery could be relegated to insignificant medical history, except for the fact that it is still being recommended and publicized in the lay press. In her book *The Search for the Perfect Orgasm* (1973), Jodi Lawrence noted: 'Other magic that a plastic surgeon can perform to add to sexual pleasure . . . [includes] reconstructure of muscles to lower the clitoris . . . .'

book, published in 1980, Edward Wallerstein makes the bold statement that "[f]emale circumcision is currently practiced in the United States. The very concept of female circumcision is startling; but that it is encouraged in the United States today is even more startling."[65]

In 1982, the World Health Organization declared that the practice of FGM by immigrants made it a public health issue in Europe, Canada, Australia, and the United States. [66] Although no studies accurately reflect the frequency of FGM in the United States, there are common reports of its occurrence.[67] In 1993, in the

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> In recognition of the popularization of such surgery, articles in the medical press, as recently as 1974, have disclaimed the importance of the relative position of the clitoris. But the surgery marches on. In his book *Sexual Behavior in the 1970s* (1975), Morton Hunt stated: 'Certain sex researchers in the 1970s even recommend surgical operations to free or move the clitoris.' And the following statement was found in the November 1976 issue of *Cosmopolitan*:
>
> > [The clitoris] factor in female sex response is not so much size as placement. There is great variance in the distance between the clitoris and the top of the vaginal opening; the farther away, the less likely it is to be rubbed by the penis during intercourse.
>
> Although this surgical procedure has been recommended on and off for over 50 years, there is not a shred of evidence to support the claimed benefits. For that matter, there are no records of the number of such operations performed; it is probably a very rare procedure. What is important is that the mythology still persists, and that women are given the impression that quick and simple surgical solutions, for what may be deep-seated emotional problems, are readily available.
>
> The surgery to lower the position of the clitoris is often combined with female circumcision. Drs. Isenberg and Elting claimed: ' . . . size has nothing to do with sensitivity – the position and accessibility of the clitoris are prime factors in ease of orgasm.' So now it is not only position but accessibility that counts! The theory is that the foreskin hides the clitoris and holds it down, and so circumcision will release the clitoris, which will therefore be more accessible to touch, making the sexual response both more rapid and more rewarding. There is no scientific evidence to support such claims.

Id. at 178-79.

65 WALLERSTEIN, *supra* note 55, at 34.

66 DORKENOO, *supra* note 8, at 10.

67 *Id.* at 32.

United Kingdom, a doctor was struck off the medical register for professional misconduct for agreeing to perform genital mutilation.[68]

The cutting away of female external genitalia claims a deep and expansive history of culture and tradition. What of the rights and entitlements of FGM's potential and surviving victims?

III. AN ENTITLEMENT TO A RIGHT: PARENTAL IMMUNITY OR SEXUAL ABUSE

"Individual rights are political trumps held by individuals."[69]

What does having a political trump mean in our routine lives? Dworkin argues for two ideas that must be accepted by anyone who takes rights seriously. One idea asserts human dignity as a consequence of treating an individual in ways that are consistent with recognition of the person as a full member of the human community, and that to do otherwise is manifestly unjust.[70]

> The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if

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68 *Id.* at 10.

> Outside Africa FGM is practised in Oman, both North and South Yemen, and the United Arab Emirates (UAE). Other Arab countries in which it has been reported to be practised are Bahrain, Qatar and some areas of Saudi Arabia. Reports from doctors and midwives working in the Middle East indicate that infibulation is practiced widely by immigrants from the Sudan and Somalia. However, the extent of the practice in the Middle East is unknown and research data is required to confirm its prevalence and type. FGM is practised by the Ethiopian Jewish Falashas who have recently settled in Israel and there are reports that the Bedouin women of Israel also practice FGM.
>
> Clitoridectomy is reported to be practised in South America by some indigenous people in Peru, Columbia, Mexico and Brazil. Again the extent of the practice is unknown. Female circumcision is practised by the Muslim populations of Indonesia and Malaysia and by Bohra Muslims in India, Pakistan and East Africa.
>
> In Western countries – Europe, Australia, Canada and the USA – immigrant women from areas where FGM is practised are reported to be genitally mutilated, but there are no studies on its prevalence in immigrant populations nor on the numbers of girls at risk.

Id. at 32.

69 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977).

70 *Id.* at 198.

> some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom.[71]

What function, in the utilitarian sense, does having a political trump serve? Here, Dworkin's theory, in arguing that there are two forms of political rights, goes this way, "[B]ackground rights, which are rights that hold in an abstract way against decisions taken by the community or the society as a whole, and more specific institutional rights that hold against a decision made by a specific institution."[72]

Who will hold the trump of "rights," both background and specific institutional, in FGM factual scenario litigation? Parents protected by the common-law doctrine of parental immunity or mutilated girls? Further, are deuces wild in the sense of the higher-ranking trump changing from state to state? I favor the girls over parental custom and tradition. Therefore, for me, the root question is not so much about parental immunity as it is a question about the girls' entitlement to personal pursuit of happiness.

Just as we would be outraged if a parent cut off a child's hand "because they didn't need it" or "because they could only get into trouble with it," we should be outraged at the assault on the female child's body. The attack is a physical assault and mutilation. It does not escape that status because it is on the female sexual organs. The long-term repercussion may be loss of orgasm. But there is no guarantee of orgasm if left intact. There is the potential of a less fulfilling sex life. But there is also the potential for infection, loss of child bearing capacity, increased risk of pain and suffering during sex, menstruation, and/or childbirth. It is sexual abuse and sexual assault. All of this is especially true if the girl is raised to adulthood in the United States.

Is sexual joy a right that rises to the level of a political trump entitled to national legislative protection? If the answer to this question is "no," deuces are wild and the girls will be left to the ingenuity of individual local counsel without common law case precedent. In my view, the state, in the larger sense of country, must use its power to protect flesh that exists, apparently, for sexual pleasure only. National legislation is necessary to provide a uniform civil remedy in addition to the existing provisions for criminal prosecution. To put the question this way, is there a public mandate for our government to pass "happy laws" in national legislation for the benefit of FGM potential victims? Once FGM is understood as sexual abuse, I think so.

A young circumcised female, once healed physically, can possibly suffer only mentally, not physically. In Alice Walker's novel, without the heroine's

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71 *Id.* at 198-99.

72 *Id.* at 123.

experience of sexual orgasm before the circumcision, she possibly escapes mental suffering because of the "you-can't-miss-what-you-never-had" axiom. The absence of childbirth throughout her fertile years soothes the pain described in the narrative above by avoiding it altogether. Therefore, the possibility looms that she may not have a pain and suffering remedy in tort law as we know it.

As a practical matter, there also looms a question on the type of evidence the plaintiff must present as a measure of damages. Stated bluntly, how much is a sexual orgasm worth? What is the value of a lifetime lived with sexual joy compared to a lifetime lived as a sexual drudge? And for the sexually inexperienced, how does she prove the "but for the mutilation she would have experienced orgasm," proximate cause element of a tort?

The issues of law and fact around the potential plaintiff's case are many. Are her parents liable to her for an intentional tort? Does the doctrine of parental immunity serve to insulate the parents from liability? Are the medical personnel civilly liable for participating in the surgical procedure, although the parents consented and in fact, requested the procedure? The same questions arise in connection with the extended family members who were supportive of her parents' decision to proceed with the circumcision. Should any of these persons be the focus of criminal charges? If so, which persons and what charges? What period of time should the woman have, after reaching the age of majority, within which to bring her litigation? If the woman is married, does the doctrine of "spouse's loss of consortium" extend to cover loss of pleasure rather than loss of physical ability? If she brings litigation, what will constitute her measure of damages? In this cornucopia of questions there lies a particularly thorny and provocative one: can a United States citizen, under the age of consent, be taken from this country, made to endure mutilation outside the United States, and upon reaching legal majority bring a civil suit against residents of this country for damage arising out of actions that occurred extraterritorially? Or plainly stated, can a girl, taken by her parents to a source country of FGM, later bring litigation against the parents in the United States for their actions taken elsewhere? Although this last question requires a response in its international parameters beyond the scope of this Article, it begs for a positive answer on behalf of the girls.

All of these stated issues arise for consideration. My inquiry, however, about happiness as an entitlement, and its pursuit as a right that is fundamental, must be answered "yes" before eliciting answers to any of the above questions in a way that favors the girls. In the face of grave life or death questions experienced by some mutilation victims, joy perhaps, seems an inessential. "Pursuit of happiness" as a facet of the "life, liberty, and pursuit of happiness" trilogy sounds ignoble when put alongside life, liberty, and survival. Nevertheless, the plight of girls and women who are citizens of this country, robbed of their ability to have a sexual orgasm, and left without a definitive, uniform civil remedy throughout the

United States brings happiness to the discourse agenda. Can the entitlement, so willingly conceded in a vacuum, withstand assault by the parental immunity doctrine, and/ or a religious ritual assault? Immediately upon answering the question, whether yes or no, we make a political choice. Move the child around the United States and her rights might change from yes to no from state to state.[73]

Rights are time and place specific to institutional politics. In the instance of FGM, there are multiple bad witches who perpetuate the practice with a concomitant abundance of liability to go around. Therefore, the scope of legislation establishing civil liability for all persons who participate in FGM must reach beyond state boundaries.

Because participants in the practice of FGM include parents who will be targets of liability claims and criminal sanctions under my proposal, opponents of the practice must be prepared to argue against the parental immunity doctrine and coalesce with sufficient agreement to comprise a distinct and notably powerful institution. Groups speaking on behalf of the young girls take on crucial roles if we are to have sufficient power chips to leverage passage of national legislation targeting parents as sexual abusers and bestowing specific right on the girls.

I am using the term "right" as described by Ronald Dworkin in *Taking Rights Seriously.*[74] In addition to his political trump statement, Dworkin writes, "Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[75]

Our formal jurisprudential story of self-autonomy carries deep implications for the human spirit. To intentionally not address mental or psychological issues that must be engaged in assimilationist society, it is otherwise fundamental to this country's collective belief system that each individual lives autonomously and can redesign their own body as they wish, once they reach the age of legal majority. This belief qualifies as a political trump that *Taking Rights Seriously* [76] discusses.

Children do not possess the power of voice against actions of their parents, especially in infancy and early childhood. Nor do children possess sufficient worldly knowledge to know or understand that FGM is not universal in its practice.

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73 See the Appendix to this Article for a listing of states and the differences in their policies concerning parental immunity and sexual abuse by parents.

74 DWORKIN, *supra* note 69, at 123.

75 *Id.*

76 *Id.* at 136.

That is why a specific right is needed that holds against their parents on the children's behalf.

A. Parental Immunity

The various approaches the courts take to determine if a child can maintain an action against a parent can be divided into four categories: (1) full immunity, (2) partial immunity, (3) abolition of immunity, and (4) complete abrogation of the parental immunity doctrine.[77]

"At common law, a child, emancipated or not, could sue a parent for breach of contract and for property related torts. Furthermore, adult and emancipated children could sue a parent for all torts, whether personal, property-related, or contract based."[78] The Mississippi Supreme Court was the first court to create the parental immunity doctrine in the landmark case of *Hewlette v. George*.[79]

After the *Hewlette* decision in 1891, courts in other states adopted the doctrine of parental immunity in some form. The states generally went from the common law doctrine of allowing a child to bring suit against its parents, to the disallowance of suits by children against parents for any reason.[80] "Some states barred only negligence claims by an unemancipated child, while others prohibited even intentional tort claims. As might have been anticipated, the doctrine resulted in some outrageous and unjust decisions. Unemancipated children were prohibited from recovering from their parents for injuries resulting from rape, brutal beatings, . . . and other situations."[81]

Not until 1963, did a state court begin a retrenchment of the absolute immunity doctrine. The Wisconsin Supreme Court held in *Goller v. White*[82] that the child could bring suit against the parent, thereby abrogating parental tort immunity, except in those cases where the alleged negligence involved "an exercise of parental authority . . . [or] ordinary parental discretion with respect to the provision of food,

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77 Geoffrey A. Vance, *Rock-A-Bye Lawsuit: Can a Baby Sue the Hand That Rocked the Cradle?*, 28 J. MARSHALL L. REV. 429 (1995).

78 Sandra L. Haley, *The Parental Tort Immunity Doctrine: Is it a Defensible Defense*, 30 U. RICH. L. REV. 575-76 (1996) (footnotes omitted).

79 9 So. 885 (Miss. 1891).

80 Haley, *supra* note 78, at 578-79.

81 *Id.* (footnotes omitted).

82 122 N.W.2d 193 (Wis. 1963).

clothing, housing, medical and dental services and other [similar] care.'[83] The holding in *Goller* began an abrogation of the doctrine. Today, many states follow the partial immunity doctrine enunciated in *Goller*.[84] The "reasonable prudent parent" principle is commonly found in judicial language.[85]

The troubling piece of the *Goller* doctrine in relation to FGM is that it excepts parental action that falls within the sphere of parental control, authority, and discretion from suit by the child. Ordinarily, I would not question the exception as unreasonable. In fact, I generally agree with the exception because its sphere seems reasonable for most parental actions involving their children. Arguably, however, the exception allows a decision by parents to choose a family custom, tradition, or religious ritual that allows the practice of FGM, because the practice is not considered mutilation but an enhancement of a girl's femaleness. A "reasonably prudent parent" could insist on having a daughter mutilated because it is customarily practiced within the parents' culture.

B. Sexual Abuse

Deny FGM a safe harbor in the doctrine of parental immunity. Instead, FGM deserves characterization as sexual abuse. Sexual abuse manifests itself in different ways. It seems to me, however, that its central theme is a use of genitals in a way deemed by the culture of its practice as, at a minimum, inappropriate and undesirable. Without going to the extreme of the spectrum in thought, mutilation of babies, youth, adolescent, and young women by cutting on and cutting away their external genitalia qualifies as sexual abuse.

Some jurisdictions now allow children victimized by abuse (sexual or physical) to sue their abusive parents. However, in many jurisdictions, the doctrine prevents children from suing their parents for damages resulting from willful, wanton, malicious, or intentional tortious acts, such as child abuse and incest.[86]

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83 Haley, *supra* note 78, at 580 (footnotes omitted).

84 See Appendix to this Article. *See also* Caroline E. Johnson, *A Cry For Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U. L. REV. 617 (1993).

85 Vance, *supra* note 77, at 457.

86 *Id.*

The Supreme Court of Indiana spoke on parental tort immunity in the context of an intentional tort – rape;[87] so have the supreme courts of Arkansas,[88] Alabama,[89] and Texas.[90] These decisions point to emerging trends in the area of intentional tort sexual abuse cases. The Texas decision discusses the emerging trend of a five-year statute of limitations in parental intentional tort cases, specifically sexual abuse.[91]

The Indiana decision acknowledges that the parental immunity doctrine is under attack from many quarters. The court stated that "[t]hese issues are still in flux in American jurisprudence."[92] For purposes of my analysis of how FGM fits into the parental immunity doctrine, the *Barnes* decision also stated that "[n]o Indiana case has applied the immunity to shield a parent from an action alleging intentional felonious conduct."[93]

What must not happen is that states go all over the place in court rulings on parental liability and FGM. Worse yet, in a case of first impression a state court holds no liability for parental solicitation of FGM, thereby starting a trend that other states follow. The rule against FGM must come from national legislation for both uniformity and assurance that there is no room for judicial willingness to absolve parents because their actions were within the sphere of the "reasonable parental discretion" discussed above. National legislation that includes a civil remedy for the practice of FGM should also define the practice as sexual abuse. The state court trend places sexual abuse outside the parental immunity umbrella of protection.

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87 Barnes v. Barnes, 603 N. E. 2d 1337 (Ind. 1992).

88 Robinson v. Robinson, 914 S.W. 2d 292 (Ark. 1996). In *Robinson*, an adult daughter brought an intentional tort suit against her father based on sexual abuse. *Id.* Prior to this case, the court had held that "[a] willful tort committed by a parent against his child was beyond the scope of the parental immunity doctrine." *Id.* at 293. The case was remanded on other grounds. *Id.* at 292.

89 Hurst v. Capitell, 539 So.2d 264 (Ala. 1980). In *Hurst*, a minor, through her grandmother, sued her stepfather for damages on claims of sexual abuse. *Id.* The court held that the doctrine of parental immunity was no longer viable in sexual abuse cases but that proof of alleged sexually abusive conduct must be tested under clear and convincing standard. *Id.*

90 S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996). In *S.V.*, a child alleged that her father had sexually abused her until she was 17-years old. *Id.*

91 *Id.* at 21-22.

92 *Barnes*, 603 N.E.2d at 1340.

93 *Id.* at 1342.

Here, Dworkin's language in discussing the action a government must take when it defines a right fits my reasoning when I claim that FGM deserves national legislation. In Dworkin's view,

> When the government . . . defines a right, it must bear in mind . . . the social cost of different proposals and make the necessary adjustments. Once it decides how much of a right to recognize, it must enforce its decision to the full. That means permitting an individual to act within his rights, as the Government has defined them, but not beyond, so that if anyone breaks the law, even on grounds of conscience, he must be punished.[94]

To follow this theory into the realm of physical reality means that although parents believe themselves to be acting in good conscience, legislation against the practice of FGM would be enforced with the full power of this country's government.

IV. INSTITUTIONAL POWER IN RELIGION, MORALS, AND POLITICS

A. Institutions Defined

> "Dear Sir,
> Please can you send me some information on female circumcision, I am sixteen years of age and my parents wish to send me to my Auntie to have this done. They are very understanding but will not explain what actually happens. I saw your address on Oracle." [95]

An institution includes entities other than the formally structured systems we usually think of in connection with the term, i.e., educational systems, the Congress, the Supreme Court, or our local governmental authorities. Institutions are also the traditions and customs of a small community and of a large community, i.e., a religion or a country, respectively.

I am using this part of my Article to define the term "institution" because such a definition provides us with a context of reference to read against for comprehending the tremendous power of custom, tradition, and culture to obtain and secure conformity. Understanding institution in its full measure sharpens our perception of the breadth and depth of inculcated parental belief concerning FGM's necessity to bring honor and worthiness to their daughters. Once the power of

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94 DWORKIN, *supra* note 69, at 198.

95 DORKENOO, *supra* note 8, at 13.

institutionalized belief is understood, we readily understand how parents and other family members would argue for the "rightness" of FGM and insist that the practice should be allowed under the parental immunity doctrine.

In *Cultural Pluralism and the American Idea*, Horace M. Kallen refers to the formation of boundaries. He says, "Much that tradition calls culture consists in formations of such boundaries as procedures in thinking, feeding, loving, fighting, playing, working – communing with men, animals and gods, through the media of signs, symbols, speech and icons that preserve as well as utter and denote the procedures."[96] I think of the boundaries to which Kallen refers as the control mechanisms that cultures experience as power.

In specific reference to institutions as an already formed boundary, Michael Foucault puts it thusly, "The term 'institution' is generally applied to every kind of more-or-less constrained, learned behaviour. Everything which functions in a society as a system of constraint and which isn't an utterance, in short, all the field of the non-discursive social, is an institution."[97]

Steven Winter[98] says it a bit differently, but comes to the same end:

> An institution is neither a specific place, a particular building, an identifiable group of individuals, nor a book of behavioral prescriptions. Whether we are speaking of IBM or the rules of etiquette, an institution is nothing more (or less) than the practices, reward structure, and attendant processes of socialization that successfully reproduce a set of roles, values, and routines in an ever-changing group of people who constitute the institution's "personnel." (Consider, for example, the powerful social and psychological dynamics provoked by the rebuke that so-and-so isn't "a team player.")
>
> In short, an institution is the continuation over time of "socially structured and culturally patterned behaviour." It is the amalgamation of the routinized actions of successive groups of socially constituted individuals.[99]

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96 HORACE M. KALLEN, CULTURAL PLURALISM AND THE AMERICAN IDEA 21-22 (1956).

97 FOUCAULT, *supra* note 1, at 197-98.

98 Winter, *supra* note 13, at 775-76.

99 *Id.* at 776.

Within the context of FGM, I define an institution as the pattern of an already formed behavioral boundary that is seldom challenged in its mandate for conformity. I also accept the Foucault and Winter definitions of an institution as correct, especially in reference to FGM. Many institutions in their source countries operate to perpetuate the practice. Look again at the story of the girl who was mutilated at eight years of age whose mother responded to her question of why, with the answer of "she had to – that it is tradition, it is custom. Anyhow, she was pressurized into it by grandparents and relatives."[100]

B. The Bad Witches Of Custom and Tradition

Of the institutions that perpetuate FGM, the most vocal and staunchest supporters of its continuance are, astoundingly, the women in the countries of its practice who have themselves been circumcised.[101] The yesteryear victims grow up and become predators. The female kin of the young girls, including their mothers and grandmothers, take them to have the circumcision performed. The female kin also hold the young girls down during the procedure, amidst the screams, when anesthesia is not available. The deaths of young girls who hemorrhage to death during the procedure or die later as a result of massive infection have not daunted the female kin in their enthusiasm for bringing their daughters and nieces to the place of mutilation.

The author of *Women of Omdurman, Life, Love and the Cult of Virginity*, Anne Cloudsley, writes of knowing

> an Egyptian girl who married a Sudanese while he was studying in Cairo and they came to visit his family in Omdurman. During their stay he had to leave home on business. The women of the *hosh*, knowing the girl was not infibulated, discussed the matter with her, saying she should undertake the operation. All Sudanese men desired it and her husband would sooner or later divorce her if she did not do so. It was the custom in the Sudan they said. The women pressed their advantage and it preyed on the girl's mind. She decided to be infibulated before her husband came home. On

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100 DORKENOO, *supra* note 8, at 123.

101 In trying to discuss the reason for infibulation in modern Sudan, one comes across diverse and contradictory opinions from both sexes. In general women still think that it is 'improper' and shameful not to be infibulated. They are frightened that without it they would neither win nor keep a husband.
CLOUDSLEY, *supra* note 8, at 120.

> his return he was very angry with the women, explained why he had married an Egyptian and straightway divorced his wife.[102]

Cloudsley reports,

> She returned to her home and it is unlikely that she would ever have married again. The Sudanese women probably guessed the outcome. They were offended and jealous that the man had not chosen one of his cousins or some other Sudanese girl to be his bride. Furthermore, they may irrationally have felt it unseemly to have her in their *hosh*. Many are convinced that it is not only immoral not to be circumcised but would allow a girl to be unfaithful to her husband. This would be shameful for the family and they would lose their honour.[103]

The victims, learning to identify with the oppressor, take on the pernicious paradigm as their own to perpetuate. What I must be careful to note here, however, is that the women feel a need to belong and do not want to be cast out of their culture. I recognize the frailty of the women in their absence of power to reconstruct their role. Even so, with that note, I categorize women supporters as an institution helping to perpetuate the practice,[104] a bad witch.

In addition to the women advocates, male supporters of the practice comprise a perpetuating institution,[105] a bad witch. The story of the men who claim to oppose the practice mirrors a perpetuating institution because they do nothing to end it,[106] a bad witch.

There are the women who perform the circumcision procedure. These women support the continuance of the practice because of the money they receive as payment and the prestige they possess in the community,[107] a bad witch.

A matrix of superstitions, perceptions of gender roles, beliefs regarding health, and religious customs constitute the rationale behind FGM. This matrix

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102 *Id.* at 118-19.

103 *Id.* at 119.

104 *Id.* at 120.

105 *Id.* at 127.

106 LIGHTFOOT-KLEIN, *supra* note 40, at 13-14.

107 CLOUDSLEY, *supra* note 8, at 108.

fuels the actions of the participants in the FGM process, and also constitutes a separate institution, a bad witch.

All of these informal institutions coalesce into a monolithic community custom and tradition institution. In those countries where laws have been enacted to end the practice, the government turns its back and does not enforce the legislation,[108] a bad witch. The different persons in their respective institutions – the women supporters, the men supporters, the women who perform the procedures, the men who are silent, and the governments that do nothing – each makes a political choice that continues the practice.

The nefarious monolith might well continue to prove invincible in its source countries because of its custom and tradition perpetuation. Like the hydra, no one place exists to cut off the head. With a public education provision in United States' legislation that reaches girls already in the country, we can, however, begin the process of ending the practice on girl children who are citizens of this country. Knowledgeable young girls, such as the one who wrote the inquiring letter with which I opened this section, will obtain information vital to their well-being.[109] As their numbers increase, they will ultimately form a critical mass for the insurgency I address in Part C.

C. Institutional Power

> There exists no single "bad witch" to hold accountable for the practice of FGM.

The institutions listed earlier of the mothers and female kin, women who perform the FGM procedure, men who support it and men who do not but participate by complicity, and the governments that do nothing to stop the practice, each fit perfectly a Michel Foucault power theory: "This is an extremely complex system of relations which leads one finally to wonder how, given that no one person can have conceived it in its entirety, it can be so subtle in its distribution, its mechanisms, reciprocal controls and adjustments. It's a highly intricate mosaic."[110] It is a highly intricate, complementary imagery of bad witches coming together as one.

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108 LIGHTFOOT-KLEIN, *supra* note 40, at 44.

109 DORKENOO, *supra* note 8, at 13.

110 FOUCAULT, *supra* note 1, at 62.

In preparation of a base on which to build his own power theory, Foucault discusses two traditional "major systems of approach to the analysis of power."[111] One method reduces power to the concept of the sovereign and an original right held by the populous that was relinquished in exchange for an agreement made with the sovereign.[112] The second entails war-repression, and at the bottom line, a relationship where there is domination, a "perpetual relationship of force."[113]

Ultimately, Foucault makes a case for a concept of power that seems to be more fully developed than the two traditional theories. Power "is not a static commodity held invincibly by an individual or even a group."[114] In Foucault's view, power as a substantive "something" simply does not exist. Power only exists "in relation to" and circulates through a dynamic network of relationships where people provide constantly shifting power relations as vehicles of power.[115] "The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual that power has constituted is at the same time its vehicle."[116]

The practice of FGM mirrors Foucault's theory of power in FGM's relation to and circulation through a dynamic network of relationships. On this theory, there exists no single "bad witch" to hold accountable for the practice of FGM. Each institution that aids the practice qualifies as one of the bad witches. These institutions may well stretch across state boundaries in this country. To the extent populations are mobile, that is the extent to which perpetuating institutions co-exist in states that would ban the practice altogether and states in which there is no legislation.

Seeming to speak directly to the practice of FGM, the following concept captures the core of the situation:

> Between every point of a social body, between a man and a woman, between the members of a family, between a master and his pupil, between every one who knows and every one who does not, there exist relations of power which are not purely and simply

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111 *Id.*

112 *Id.* at 89-90.

113 *Id.*

114 *Id*

115 *Id.* at 97.

116 *Id.* at 142.

> a projection of the sovereign's great power over the individual; they are rather the concrete, changing social in which the sovereign's power is grounded, the conditions which make it possible for it to function. The family, even now, is not a simple reflection or extension of the power of the State; it does not act as the representative of the State in relation to children, just as the male does not act as its representative with respect to the female. For the State to function in the way that it does, there must be, between male and female or adult and child, quite specific relations of domination which have their own configuration and relative autonomy.[117]

Analysis of this Foucault statement reveals complementary image portrayal and the control element of domination. These power images require a dominant and a subservient that complement each other or an occasional relationship between equals.

Steven Winter champions Foucault's theory in *The Power Thing*.[118] Images requiring complements make one of Winter's conceptual statements of power deeply insightful and definitely relevant to FGM. Winter articulates his power theory thusly,

> Like all dynamic systems, the various elements feed back on one another.... Second, because systems of power relations have such ecological properties, a dynamic view does not necessarily yield an understanding of power as endlessly mutable or ephemeral. It is one thing to recognize that power is neither a "thing" nor the static property of particular actors, but rather that it is an ongoing interplay of strategic maneuvering between partners. But it is quite another to conclude that power is precarious and to assume, therefore, that things could easily be different. The various situational factors that influence and condition power relations will frequently interlock so as to render power relatively secure. Indeed, the available evidence suggests that, notwithstanding dramatic changes in the consciously-held values concerning gender relations, there is much greater persistence with respect to the underlying practices that constitute our contemporary system of gender power. True, power is vulnerable to disruption because it

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117 *Id.* at 97.

118 *See generally* Winter, *supra* note 13, at 721.

> 'is produced from one moment to the next.' But this does not mean that social transformation is in any sense easy.[119]

Winter then argues that power should be understood as the product of an interplay of actions and attitudes between social actors, each equipped with corresponding or complementary images of a particular social relation[120] of meaning in which both oppressor and victim are deeply complicitous. Power, argues Winter, is socially contingent and therefore a "matter of relative interpretive conclusions."[121]

Winter is careful to note the intractable nature of power in stating,

> To say that power is a matter of interpretation is not to say that one can make it disappear merely by thinking it away. Power is quite real as a social fact. It is real precisely to the extent that it is based on cultural meanings that people internalize and *act on.* To be more precise, power is an *interpretive institution.* Like all social institutions, it exists only so long as the actors who constitute it continue to reproduce their respective roles and routines.[122]

Ultimately, Winter presents his power theory thusly, "On this view, what we commonly refer to as 'having' or 'being in power' is in actuality the differential ability to inflict costs."[123]

The deep complicity of all participants accounts for FGM's perpetuation. The deep complicity also mirrors the power of incumbency to sustain itself through manipulation of a culture's reward system. Having to take a stand opposing FGM singly, and outside the traditional culture, one by one, girl children or their mothers simply do not have the strength and wherewithal to end power relations the groups constituted as bad witches have put in place. Thus, the intractability of FGM's power incumbency self sustains. Particularly telling of the FGM story is Winter's phrase, "differential ability to inflict costs."[124] Dorkenoo addresses methods of silencing women who would otherwise speak out by stating, "Young women cannot

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119 *Id.* at 818-19.

120 *Id.* at 823.

121 *Id.* at 831.

122 *Id.* at 831-32.

123 *Id.* at 829-30.

124 *Id.*

speak out publicly against genital mutilation because of fear of reprisals from other members of the community. They are commonly branded as prostitutes for expressing the mental conflict arising from self, sexuality and FGM."[125]

In the intricately woven mosaic I described earlier in this piece, complementary roles enable one institutional collective goal of the mutilation perpetrators; that of increasing sexual pleasure for men sexually active with women who have genitalia sewn shut to the point of a matchstick. Some proponents claim a religious basis for the practice, others claim assured moral virtue as their goal. The "moms" want their daughters to marry well economically or simply to secure a man to play the husband role. The women, therefore, take their girls to be mutilated and the men reinforce the process by marrying only women who have been circumcised from a clipping away of the clitoris to major infibulation.

This collective institutional goal clearly offers nothing to justify imposing genital mutilation upon an individual. From the perspective of the girls who are mutilated, justification of the pain they describe and the permanent theft of their potential sexual joy likely lacks existence. The women family members, the men who support FGM verbally, the men who support the practice by silence, the persons who perform the mutilation, and the governments that ignore the practice, including the United States that left an exception in its legislation and did not include parents, all participate in the continuing denial of one of our most basic rights: to be secure in our persons. Security of person, although not a guarantee of happiness, at a minimum provides an avenue for pursuit.

Operative power exists as the mechanisms through which desires of persons present and voting become the accepted custom and ultimately the law. Opponents of FGM as a parental practice must, therefore, come together as the "good witches" who are present and voting at the discourse table. What institutions might we expect to have a voice in national discourse on this practice in the United States, and my proposed targeting of parents for criminal and civil remedies? In short, all persons and groups of a mind to foster the sexual well-being of women will speak out as allies in opposition to the practice.

Although I think it totally unimaginable that there would be any voice speaking on behalf of the parents and the girls' extended family participants, potential voices speaking on behalf of the parents might include the "moral majority," states' rights activists who would speak against national legislation, and as the author of *Cutting the Rose* states, "[L]iberal whites who may mean well but confuse the whole issue by condoning FGM within a naive concept of multi-culturalism."[126] Dorkenoo includes her statement about a naive concept of multi-

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125 DORKENOO, supra note 8, at 125.

126 *Id.* at 135.

culturalism within the section of her book where she addresses FGM and its' implications in relation to racist remarks.[127] The author points out,

> Many black people have confused FGM as gender oppression with the rich African culture, and because they look to their African heritage with pride, racist remarks on FGM can evoke strong sentiments of cultural nationalism. Racists remarks have the effect of putting many black people on the defensive about FGM.[128]

In Dorkenoo's view, some black persons may defend the practice as one within our African heritage and one that should be allowed to continue in the United States. I repeat myself when I, as the author of this Article, say as a Blackwoman,[129] under no circumstances should this practice be tolerated.

Obviously, the bad witch institutions possess a huge differential ability to inflict costs on those who oppose the mutilation practice. The women who survive their own mutilation cast themselves "in role" so strongly that the practice hardly needs the more formal structures of religion, morals, or politics. These structures exist, however, as cultural institutions and we are left to speculate on the intricate mosaic Foucault speaks to.[130] Which beget what?

V. INSTITUTIONAL POLITICS OF RELIGION, MORALS, AND POLITICAL CHOICE

A. A Political Institution of Religion

> "Excision and infibulation are practiced by followers of a number of different religions such as Muslims, Catholics, Protestants, Copts, Animists, and non-believers in the various countries concerned."[131]

Is the answer about the "rightness" or "wrongness" of female circumcision subject to change because of the category of question and the response elicited? For

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127 *Id.* at 134-35.

128 *Id.*

129 *See generally* Joan Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMPLE L. REV. 1343, 1343 n.3 (1997).

130 FOUCAULT, *supra* note 1, at 62.

131 DORKENOO, *supra* note 8, at 36.

example, is the American culture and the laws that mirror its cultural norms more likely than not to tolerate the practice, especially in its mildest forms, if the practice of FGM is a religious ritual?

To further illustrate, "The learned men of Islam are unanimous in the opinion that circumcision is a definite tradition as well as an attribute of the faith which should not be ignored by men. . . . This is sometimes quoted as 'circumcision is an ordinance for men and is honourable in women.'"[132]

The issue of whether to allow practices outside this country's normative culture because of a religious belief is not a novel issue.[133] The seminal case of *Prince v. Commonwealth of Massachusetts*[134] speaks to religious belief as justification for actions. The case is particularly important to this Article in its discussion of the religious precepts of parents that impact children.[135] Writing for the majority, Justice Rutledge stated,

> On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. . . . Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children . . .[136]

Using the language of *parens patriae* to describe the state, the opinion unequivocally states, "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[137] Holding that

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132 CLOUDSLEY, supra note 8, at 101.

133 Existing United States Supreme Court rulings speak to the question. *See* Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1943); *see also* Reynolds v. United States, 98 U.S. 145 (1878).

134 321 U.S. 158 (1943).

135 *Id.* at 165.

136 *Id.*

137 *Id.* The opinion fails to mention women here. I assume that because the child being discussed in the case was a girl, it is safe to assume that women were included "in the spirit" of the language.

"neither rights of religion nor rights of parenthood are beyond limitation,"[138] that parents do not operate independently of the state's authority in "things affecting the child's welfare," and that this includes "matters of conscience and religious conviction,"[139] the Justice wrote, "What may be wholly permissible for adults therefore may not be so for children . . . ."[140] Particularly relevant for a stance in opposition to FGM is the following language:

> Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make the choice for themselves.[141]

With respect to criminal prosecution stemming from actions taken while professing a belief in a religious tenet, the Mormon faith was the focus in the case of *Reynolds v. United States*.[142] This decision addresses the issue of criminal penalties and the legitimacy of the penalties when religious faith is said to be the operative force for action deemed criminal by the state. The doctrine enunciated in the 1878 case remains good law as controlling on the question in an analysis of FGM. The court stated,

> *Laws are made for the government of actions,* and *while they cannot interfere with mere religious belief and opinions, they may with practices.* Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?[143]

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138 *Id.* at 166.

139 *Id.* at 167.

140 *Id.* at 169.

141 *Id.* at 170.

142 98 U.S. 145 (1878).

143 *Id.* at 166 (emphasis added).

As the girl child's advocate, I do not overstate the case to say that the mutilated girls have indeed become human sacrifices to institutions. The young woman whose story recounts being mutilated at age eight certainly sees herself as sacrificed.[144]

Literature documenting FGM and its purported justification denies a religious basis for FGM. For example, one writer states, "The religious reasons cited for perpetuating FGM are unpersuasive because the practice is not explicitly mandated by either Islam or Christianity, the two predominant religions of the countries where FGM is practiced."[145] Another adamantly maintains, "Circumcision with infibulation has no religious justification."[146]

While not mandated, practitioners claim FGM as a religious tenet. Therefore, for the purpose of argument, I accept mutilation as religiously grounded and assume FGM will withstand scrutiny as a religious tenet that must be adhered to by its followers. The line of cases I cite above, nevertheless, requires parents to act contrary to parentally held religious principles when the safety, health, and well-being of a child are at stake. The United States' existing jurisprudence extrapolated to FGM maligns the actions of the practice, although not the belief, as described in the *Reynolds* case.[147] These cited cases offer guidance for establishing necessary public policy that will be basic to legislation outlawing FGM in this country, with no exceptions and blanket coverage. What my unreported plaintiff needs is specific legislation that specifically bans the practice by parents, as well as all others who participate, specifically provides a civil remedy of damages for the girl child, and makes it clear that religious belief will not justify the action.

B. A Political Institution of Morals

> "The claim that a moral consensus exists is not itself based on a poll."[148]

FGM arguably ensures virginity until marriage. Should the practice be tolerated on the basis of a moral argument? First, note the story that opens this Article. Even the most severe type of FGM, used as a prophylactic, only prevents

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144 DORKENOO, *supra* note 8, at 123.

145 BASHIR, supra note 7, at 424-25.

146 CLOUDSLEY, *supra* note 8, at 109.

147 *See generally Reynolds*, 98 U.S. 145.

148 DWORKIN, *supra* note 69, at 254.

the woman's pleasure. Therefore, a basic premise of the practitioners who justify their actions with moral and virginity arguments fails as fundamentally flawed.

Surely the institutional practitioners delineated in this Article know that FGM does not prevent pregnancy or sexual intercourse. Yet, the moral question argument pervades the countries where female genital mutilation is practiced. The argument goes this way: "Only the females who have been circumcised can claim moral virtue and virginity assured when the time comes for the woman to be wed."[149]

On my view, the moral argument is used to justify an action fundamentally based in economics as a component of the power/political axis. One author says, "In many societies . . . guaranteed virginity of the bride has an economic significance."[150] Proponents of the practice insist that circumcised females fetch greater bride prices and that the uncircumcised cannot expect to marry "well" economically, if at all.

The integrity of the moral assertion disintegrates when economic profitability anchors FGM. Consider the following exchange: one normal woman in exchange for a bride price and sexual drudgery. The mutilated girl pays a preciously immeasurable price for the "security" of a marriage. Her parents and family profit. It is when her generation becomes the parent and kin that she receives a return on her investment from her daughter who at that time pays the same price as her "mom" did. Held as a religious tenet by the genuine believers, FGM may pass muster on the immoral question. This is not so when viewed as an economic justification. Unlike male circumcision that clips away a portion of the penis foreskin, but does not impede sexual enjoyment, female genital circumcision condemns a woman to sexual drudgery. As pointed out earlier in this Article, "[t]o compare FGM to male circumcision requires comparison to a cutting away of the penis."[151]

Acts that deprive otherwise sexually healthy human beings of their sexual wholeness and well-being in exchange for monetary gain are immoral acts. On par with slavery that deprives persons of freedom, FGM casts girls into what may be a worse hell of mental bondage. [152]

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149 Bashir, *supra* note 7, at 428.

150 ABDALLA, *supra* note 21, at 63.

151 Bashir, *supra* note 7, at 415.

152 For my thoughts generally on mental bondage and its comparison to slavery as physical bondage, see Tarpley, *supra* note 129.

C. *A Political Institution of a Political Choice*

> "The prevention of genital mutilation of girls in the Western world gets caught up in a web of adult politics of culture, class, gender and race."[153]

The politics in the source countries of FGM are pervasive but not complex. All of those persons present and voting by custom and tradition clearly vote in favor of continuing the practice, even those who vote by their silence. Because of a rapidly expanding global interdependence, I agree with Dorkenoo where she says, "In many ways the protection of... girls growing up in Western countries from the practice is an emergency issue which has not been recognized at policy level. This is not because girls growing up in the Western world are more special than girls growing up in traditional societies."[154] It is because of the psychological trauma I described earlier in this Article based on Dorkenoo's counseling. That counseling revealed the absence in the Western counties of reinforcing custom and tradition.[155] The western world countries simply structure and reinforce gender roles differently.

As a political issue in the United States, in the spirit of broad-minded liberalism, should the choice of practicing FGM be left to parents as the decision making authority? No. In *The Disuniting of America*,[156] Arthur Schlesinger, Jr. writes, "'Multiculturalism' arises as a reaction against Anglo- or Eurocentrism; but at what point does it pass over into an ethnocentrism of its own?" [157] I would like to add a further description to Schlesinger's observation: a *physically dangerous* ethnocentrism of its own. Rue the day we become so liberal as to allow the mutilation of young girls' bodies because the practice mirrors the politics of FGM's source countries.[158]

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153 DORKENOO, *supra* note 8, at 135.

154 *Id.* at 124.

155 *Id.* at 124-25.

156 ARTHUR SCHLEISINGER, THE DISUNITING OF AMERICA (1991).

157 *Id.* at 40.

158 "The practice of mutilating female genitalia exemplifies the subordination of women as a class. It is a form of 'sexual politics' – the control over the female population." *See* Daliah Setareh, *Women Escaping Genital Mutilation – Seeking Asylum in the United States*, 6 UCLA WOMEN'S L.J. 123, 129 (1995).

Female circumcision points to a political question in countries of its practice as clearly as *sunna*[159] seeks its justification in Muslim religious tenets. Focus on FGM as a political issue in the source countries comes about in the United States because of the women seeking immigration asylum in this country.[160]

On behalf of the women seeking asylum rather than return to their countries and face FGM, one author labels the practice of genital mutilation as sexual politics.[161] She argues, "In highly patriarchal societies, this kind of sexual politics plays an integral role in the maintenance of social control and status quo."[162] I agree with her statement on the use made of genital mutilation:

> This form of sexual politics also ensures that women are subordinated and helpless in a society dominated by men. In practicing societies, women are completely dependent on their husbands for economic survival, as well as for social status. Marriage becomes essential to a woman's survival and a condition precedent to getting married is that the woman be properly "circumcised."[163]

In the United States a decision to ban the practice and impose criminal and civil sanctions against *any* person who participates in the activity and resides in the United States, clearly raises a matter of political choice. If we are to succeed in banning FGM with no exception and encompassing parents and family as targets in addition to the "surgeons," we must succeed through avenues of politics, the corridors of power. For this success, we must possess a sufficient number of the power mechanisms Foucault describes, a number that empowers opponents of FGM to reconstitute societal patterns of behavior on the FGM issue in this country.

Particularly helpful here are Michael Foucault's and Steven Winter's arguments that power is a dynamic activity circulating through networks and systems of relationships. Winter's argument empowers the seemingly subordinated:

> The first advantage of this systemic understanding of power is that it suggests an alternative to the cycle of naming and blaming that

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159 CLOUDSLEY, *supra* note 8, at 110.

160 *See generally* Bashir, *supra* note 7. *See also* Seterah, *supra* note 158, at 129.

161 Setareh, *supra* note 158, at 123.

162 *Id.* at 123.

163 *Id.* at 125.

> so often polarizes rather than helps in the struggle to rectify the very real problems of inequality and subordination.
>
> The second advantage of this reconception of power is that it is, in a profound sense, empowering. To understand power as a property of a social system of relations is to see power as a shared resource that can be activated from many different positions within that system. Once power is understood as relational, it becomes apparent that at least some of what the dominant "have" must already be available to the subordinated. Indeed, there is an important sense in which this second point is the same as the first. The deconstruction of power is also the deconstruction of the agency and autonomy of the traditional liberal subject. This means that responsibility for subordination and inequality cannot be localized in certain identifiable agents; it is widely distributed throughout the social network. To the exact degree that this understanding of power diminishes the agency of the dominant, it amplifies the agency of the subordinated. What it subtracts from one part of the network, it necessarily redistributes to the other.[164]

Both Foucault and Winter argue that power needs a relational process for activation and therefore it must be examined from its obvious externalization into the capillaries of its mechanisms and its agencies.[165] With language different from the immediately preceding quote of Winter's, Foucault says,

> In other words, one should try to locate power at the extreme points of its exercise, where it is always less legal in character. . . . [I]t is a case of studying power at the point where its intention, if it has one, is completely invested in its real and effective practices. What is needed is a study of power in its external visage, at the point where it is in direct and immediate relationship with that which we can provisionally call its object, its target, its field of application, there – that is to say – where it installs itself and produces its real effects.[166]

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164 Winter, *supra* note 13, at 835.

165 FOUCAULT, *supra* note 1, at 97.

166 *Id.*

Simply put, both argue that everyone has power, including the individual perceived as the most subjugated. Therefore, power analysis best begins at its furthermost, smallest point in a relational system.

The relational process piece of the theory argued by Winter to be empowering supports my argument in this Article for creation of a rule that protects girl children from their own parents. Foucault's theory stated differently but conveying the same meaning is, a proactive stance rather than victim posture can destabilize existing power systems at their outermost reaches. Sufficient destabilization potentially creates a desired change in the network of power relations.

The relational process theory of power analysis empowers the subjugated because it carries a message that a critical mass insurgence changes custom and tradition as a vehicle of power. To the Foucault and Winter analysis I add *over a sufficient period of time.* Therefore, having included my own spin, my analysis of the power process in connection with the practice of FGM claims that a critical mass insurgence, by protesting women, over a sufficient period of time will change the power relationship within an institution. Once a critical mass insurgence occurs, traditional boundaries change and shift sociopower relations.[167] Education about the practice in this country can over a period of time create a critical mass of younger girls who protest having their bodies mutilated.

It can be done. Assume the subjugated as the capillaries of power mechanisms analyzed by Foucault. Major revolutions in the history of civilization demonstrate the theory of "little people" change the system if there exists enough of them working at change for a long enough time without being co-opted. Ghandi's protest in India, the American Revolution, the Civil Rights Movement in this country, and the Feminist Movement exemplify changing the power relations within an institution. The United States excels among countries for the willingness of the "people" to storm city hall. Therefore, I see the United States as a fertile land for growing a critical mass of persons who push to go beyond the British model of legislation that only targets persons who do the cutting away of female genitalia.

The use of Dworkin's argument that once government defines a right, "it must enforce its decision to the full,"[168] employs Foucault's theory of a traditional view of power analysis, the repression theory. Here, repression of parents who would seek FGM for their daughters fits perfectly. Such active repression also enunciates a governmental policy that clearly states opposition to FGM as within

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167 And in a shorthand way, this is a paradigm shift. *See generally* Joan R. Tarpley, *Grounded Feminist Theory: And I Spring Full Grown From My Father's Head – Or Was It Really From My Mother's?*, 24 U. TOL. L. REV. 583 (1993).

168 DWORKIN, *supra* note 69, at 198.

the common good. "The bulk of the law – that part which defines and implements social, economic, and foreign policy – cannot be neutral. It must state, in its greatest part, the majority's view of the common good."[169] Black girls growing up in America who face FGM as a minority segment of the population possess a right to dignity and their security of person.

With several "bad witch" institutions, and therefore without one person or one group to target, the next part of this Article will focus on gathering a consensus from diverse perspectives that this country legislate a "happy law" in the instance of female genital mutilation.

VI. "INCOMPLETELY THEORIZED AGREEMENTS"

> "A prime goal of political liberalism is to ensure that operating with diverse perspectives, all citizens can endorse, as legitimate, certain exercises of political power."[170]

Speaking to legitimate exercises of political power, Ronald Dworkin in his book, *Law's Empire*[171] offers the following argument about a legal right in the context of legal practice:

> A person has a legal right, according to our abstract 'conceptual' account of legal practice, if he has a right, flowing from past political decisions to win a lawsuit. Conventionalism offers a positive, nonskeptical theory about what legal rights people have: they have as legal rights whatever rights legal conventions extract from past political decisions.[172]

Dworkin is saying that legal rights are time and place specific and flow from past political choices. The time and place specific characterization concerns me in the context of FGM because we do not have past political choices in the form of case precedent to use as benchmarks for individual cases. The time and place specific characterization also concerns me in the context of FGM because our national legislation contains an exception to the Section (a) rule in the legislation's

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169 *Id.* at 205.

170 SUNSTEIN, *supra* note 15, at 46-47.

171 RONALD DWORKIN, LAW'S EMPIRE (1986).

172 *Id.* at 152.

Section (b).[173] The exception can swallow the rule if it must be played out in as many federal circuits that exist with as many political choices as there are judges. The exception has the potential to put the girls back to their beginning point.

Dworkin continues at a later point with the following statement:

> [I]n law as in literature the interplay between fit and justification is complex. Just as interpretation within a chain novel is for each interpreter a delicate balance among different types of literary and artistic attitudes, so in law it is a delicate balance among political convictions of different sorts; in law as in literature these must be sufficiently related yet disjoint to allow an overall judgment that trades off an interpretation's success on one type of standard against its failure on another.[174]

This statement raises the specter of horror to an even higher dimension when I visualize individual judges in individual states rendering individual decisions in litigation about FGM. The interpretative function of judges in FGM litigation – where the questions of both liability and damages are issues to be decided – doubly troubles me. Earlier in this Article I said, "What must not happen is that states go all over the place in court rulings on parental liability and FGM."[175]

Legal theory generally, and feminist legal theory specifically, holds diverse perspectives about varied themes and political convictions of different sorts; therefore, we might well expect diverse rulings in the context of FGM. Some theorists may hold the belief that FGM deserves recognition as a religious tenet. Others may hold to a moral stance in relation to FGM. Still others may reason that the political cost of punishing parents whose citizenship lies in countries that are our foreign allies is an unreasonably costly political choice. In a liberal legal culture, however, participants "often seek agreement on what to do rather than exactly how to think."[176] From a broad spectrum of differently held views on the legitimacy of FGM, I urge agreement on the view that girl children under the age of eighteen must not be circumcised or mutilated under any circumstances. Stated positively, I urge agreement on the view that until she reaches the age of legal

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173 *See supra* notes 31-32, and accompanying text.

174 DWORKIN, *supra* note 171.

175 *See supra* Part III.B.

176 SUNSTEIN, *supra* note 15, at 48.

majority, a girl must be allowed to live a life free of the terror and pain encountered by victims of FGM.

In *Legal Reasoning and Political Conflict*, Cass Sunstein refers to an agreement in the midst of social disagreement and pluralism as an "incompletely theorized agreement[]."[177] According to Sunstein, "well-functioning legal systems tend to adopt a special strategy for producing stability and agreement in the midst of social disagreement and pluralism: Arbiters of legal controversies try to produce *incompletely theorized agreements*."[178]

What I find engaging about Sunstein's theory in relation to FGM is the theory's concrete, utilitarian value in the midst of disagreement about possible justification for the practice. What the theory manages conceptually to obtain is a rule against the practice of FGM by parents until after a female reaches the age previously determined in the law to be that of legal adulthood.

In presenting the value of his theory, Sunstein says,

> When people disagree on an abstraction – Is equality more important than liberty? Does free will exist? – they often move to a level of greater particularity. This practice has an especially notable feature: It enlists silence, on certain basic questions, as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity. Incompletely theorized agreements are a key to legal reasoning. They are an important source of social stability and an important way for people to demonstrate mutual respect, in law especially but also in liberal democracy as a whole. . . .
>
> The agreement on particulars is incompletely theorized in the sense that the relevant participants are clear on the result without agreeing on the most general theory that accounts for it. They may accept an outcome – reaffirming the right to have an abortion, protecting sexually explicit art – without understanding or converging on an ultimate ground for that acceptance. What accounts for the opinion, in terms of a full-scale theory of the right or the good, is left unexplained.[179]

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177 *Id.* at 4.

178 *Id.*

179 *Id.* at 5.

Legislation, in Sunstein's parlance, is a rule. In the instance of FGM, a nationwide rule will operate as a safe harbor for an underage female's right to pursuit of happiness. *Legal Reasoning and Political Conflict* addresses entitlements and rights in the following way:

> The key characteristic of rules is that they attempt to specify outcomes before particular cases arise. By a system of rules I mean to refer to something very simple: *approaches to law that aspire to make legal judgments in advance of actual cases.* We have rules, or (better) ruleness, to the extent that the content of the law has been set down in advance of applications of the law. In the extreme case, all of the content of the law is given before cases arise. A key function of law is to assign entitlements – to say who owns what, to establish who may do what to whom. If this is so, a rule can thus be defined as *the full or nearly full before-the-fact assignment of legal entitlements, or the complete or nearly complete before-the-fact specification of legal outcomes.*[180]

This Sunstein language fulfills precisely the concept of entitlement that I seek for potential FGM victims before litigation occurs. To counter any possible parental discretion about FGM lodged in the parental immunity doctrine, I also find the following language of Sunstein especially helpful: "Rules are often the mechanism by which legal actors reach agreement; a central virtue of (many) rules is that people can converge on them from diverse foundations. [Rules sharply discipline the territory over which argument can occur.]"[181]

The sharp discipline of territory for argument provides the protective boundaries that I seek for girl children. With the rule I propose, the only territory remaining for argument is the amount of damages in litigation where FGM forms the basis for suit. I find a rule highly preferable to the specter of litigation decisions state by state, court by court, as occurred with the parental immunity doctrine after *Hewlette.*[182] A bit-by-bit form of justice leaves too much room for absolving parental liability because of what Dorkenoo refers to as "a naive concept of multi-culturalism."

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180 *Id.* at 21-22.

181 *Id.* at 191-93.

182 Hewlette v. George, 9 So. 885 (Miss. 1891).

VII. CONCLUSION: PRESCRIPTION BY LAW

"The content of law should turn a good deal on the consequences of law."[183]

Left to me, I would amend this country's existing federal legislation thusly,

(1) In Section 116 (a), delete "Except as provided in subsection (b)."

Add: , and all persons who knowingly aid and abet the actions prohibited by this statute,
Add: The acts prohibited by this statute are of themselves sexual abuse of a minor. No further evidence is necessary to prove the same.

(2) Delete all of subsection (b) – the exception subsection.

(3) *Add* an altogether different subsection (b) provision similar to, if not exactly like the following:

> In addition to medical personnel who knowingly circumcise, excise, or infibulate a person as set forth in subsection (a) of this statute, all other persons, including parents and other relatives, who participate in the practice prohibited by this statue, shall be subject to civil liability. Damages shall be awarded in an amount that would be accorded a person who was intentionally and totally paralyzed at the age of the person upon whom this practice was inflicted.

(4) *Add* A female shall be entitled to initiate a civil cause of action under this statute for a period of up to five years after the female reaches the age of eighteen (18).

The act would then read as follows:

> (a) Whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years, and all persons who aid and abet the actions prohibited by this statute, shall be fined under this title or imprisoned not more than five (5)

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183 SUNSTEIN, *supra* note 15, at 19.

> years, or both. The acts prohibited by this statute are of themselves sexual abuse of a minor. No further evidence is necessary to prove the same.
>
> (b) In addition to medical personnel who knowingly circumcise, excise, or infibulate a person as set forth in subsection (a) of this statute, all other persons, including parents and other relatives, who participate in the practice prohibited by this statue, shall be subject to civil liability. Damages shall be awarded in an amount that would be accorded a person who was intentionally and totally paralyzed at the age of the person upon whom this practice was inflicted. A female shall be entitled to initiate a civil cause of action under this statute for a period of up to five years after the female reaches the age of eighteen (18).

Legislation directly proscribing FGM as a parental familial practice and holding all participants accountable in damages guarantees a court hearing for the female plaintiff beyond the summary judgment time sequence in litigation. A rule assures a court hearing on the issue of damages as a matter of right. Civil damages as a matter of right address the consequence of the rule that I envision, the component Sunstein puts forth as a necessary consideration in determining the need for and expanse of a rule. For second generation black girls growing up in the United States as citizens of this country, we owe them no less than a "happy law."

Sunstein argues that "[w]ith rules, the complex and sometimes morally charged question of *what issues are relevant* itself has been decided in advance."[184] This predetermination of relevance is precisely the terrain I would like to have in existence for my yet unreported plaintiff when she files her action alleging Female Genital Mutilation. Happiness pursuit requires sensory ability, and with a rule, the morally charged questions around the religious and moral tenets have been decided in advance by a body politic that agrees with the rule, but for diverse reasons.

Only through our senses is the world around us made specific and definitive. Seemingly, no one ever applies the scarcity theory to suffering. Suffering abounds. Thoreau's lives of "quiet desperation" usually account for the suffering piece of the human equation. Our human struggle emerges as we attempt to pull happiness from the magic hat of living. It is in living the human equation of both suffering and happiness that the human spirit develops its diverse and divergent perspectives. Second generation black girls growing up in this country as its citizens deserve to live fully the happiness half of the equation. In holding ourselves out as the country committed to human rights at home and around the

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184 *Id.* at 111.

globe, we must be held accountable for our home turf first and above all else. The right to be in pursuit of happiness carries with it, surely, a schematic that includes physically "Possessing The Secret Of Joy."[185]

185 *See* ALICE WALKER, POSSESSING THE SECRET OF JOY (1992).

APPENDIX

1. ALABAMA: *Full Parental Immunity in Negligence actions.* Mitchell v. Davis, 598 So. 2d 801 (Ala. 1992) (immunity prohibits all civil suits between children and parents); However, Alabama has abrogated immunity for torts involving willful, wanton or intentional misconduct (sexual abuse). The Alabama Supreme Court in *Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989), created an exception to the parental immunity doctrine involving cases of sexual abuse.

2. ALASKA: *Partial Immunity.* Determines immunity on a case by case basis. Hebel v. Hebel, 435 P.2d 8 (Alaska 1967) (motor vehicle exception).

3. ARIZONA: *Rejected Partial Immunity.* Rejected immunity determinations on a case by case basis. Broadbent v. Broadbent, 907 P.2d 43 (Ariz. 1995) (rejecting Sandoval v. Sandoval, 623 P.2d 800 (Ariz. 1981) (holding that generally, whether immunity applies depends on actual cause of injury and whether parent's act breached duty owed to child within family sphere); Streenz v. Streenz, 471 P.2d 282 (Ariz. 1970) (motor vehicle exception)).

4. ARKANSAS: *Full Immunity in Negligence Actions.* However, Arkansas has abrogated immunity for torts involving willful, wanton or intentional misconduct in *Carpenter v. Bishop*, 720 S.W.2d 299 (Ark. 1986). *See also* Atwood v. Estate of Attwood, 633 S.W.2d 366 (Ark. 1982) (nonnegligent tort exception).

5. CALIFORNIA: *Immunity Totally Abrogated.* Gibson v. Gibson, 479 P.2d 648 (Cal. 1971) (en banc) (employing the reasonably prudent parent standard).

6. COLORADO: *Partial Immunity.* Meyer v. State Farm, 689 P.2d 585 (Co. 1984) (en banc) (citing Trevarton v. Trevarton, 378 P.2d640 (1963) *superceded by statute*, Allstate Ins. Co. v. Feghali, 814 P.2d 863 (Colo. 1991)); Schlessinger v. Schlessinger, 796 P.2d 1385 (Colo. 1990); *see also* Horton v. Reaves, 526 P.2d 304, 308 (Colo. 1974) (en banc) (sustaining a cause of action involving intentional, willful, or wanton conduct by parent).

7. CONNECTICUT: *Partial Immunity.* Dubay v. Irish, 542 A.2d 711 (Conn. 1988). The Connecticut Supreme Court uses a case by case analysis to determine when immunity should be modified or limited. Generally, immunity is modified where the parent breached a duty unrelated to the family relationship, e.g., in a business setting. Also, the court may sustain a cause of action if the child is injured by an intentional act of parent. In a 1986 case, the Connecticut Supreme Court recognized, "for intentional torts involving malicious or even criminal conduct,

where the rule originated, . . . [the parent child immunity doctrine] has now been generally repudiated." Dzenutis v. Dzenutis, 512 A.2d 130, 134 (Conn. 1986) (citations omitted). *See also* CONN. GEN. STAT. § 52-572c (1991) (motor vehicle exception).

8. DELAWARE: *Partial Immunity.* Schneider v. Coe, 405 A.2d 682 (Del. 1979). Delaware grants immunity when parental control, authority, or discretion is involved, e.g., negligent supervision. *See also* Williams v. Williams, 369 A.2d 669 (Del. 1976) (motor vehicle exception).

9. FLORIDA: *Partial Immunity.* Ard v. Ard, 395 So. 2d 586 (Fl. Dist. Ct. App. 1981), *aff'd in part*, 414 So. 2d 1066 (Fla. 1982) (liability insurance exception); Orefice v. Albert, 237 So. 2d 142 (Fla. 1970) (immunity in tort actions between parents and children).

10. GEORGIA: *Partial Immunity.* Generally, a child may not sue parent in tort unless emancipated. Fowlkes v. Ray-O-Vac Co., 183 S.E. 210 (Ga. Ct. App. 1935). Exception: an unemancipated minor child has no cause of action against a parent for simple negligence; such child may maintain an action for personal injury against a parent for a willful or malicious act, provided it is such an act of cruelty as to authorize forfeiture of parental authority. Wright v. Wright, 70 S.E.2d. 152 (Ga. Ct. App. 1952). An adult child may sue a parent for negligence and a parent may sue an adult child. Davis v. Cox, 206 S.E.2d 655 (Ga. Ct. App. 1974).

11. HAWAII: *Never Adopted Parental Immunity.* Peterson v. City of Honolulu, 462 P.2d 1007 (Haw. 1970) (refusing to recognize immunity).

12. IDAHO: *Partial Parental Immunity.* Farmers Ins. Group v. Reed, 712 P.2d 550 (Idaho 1985) (immunity in situations involving parental authority in child-rearing); Pedigo v. Rowley, 10 P.2d 560 (Idaho 1980) (immunity for failure to supervise).

13. ILLINOIS: *Partial Parental Immunity.* Larson v. Buschkamp, 435 N.E.2d 221 (Ill. 1982); Nudd v. Matsoukas, 131 N.E. 2d 525 (Ill. 1956) (nonnegligent tort exception); Cates v. Cates, 588 N.E.2d 330 (Ill. App. Ct. 1992) (motor vehicle exception), *aff'd* 619 N.E.2d 715 (Ill. 1993); Schenk v. Schenk, 241 N.E.2d 12 (Ill. App. Ct. 1968) (no immunity when injury occurs outside family relationship).

14. INDIANA: *Partial Immunity.* Vaughan v. Vaughan, 316 N.E.2d 455 (Ind. Ct. App. 1974); Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992) (nonnegligent tort exception).

15. IOWA: *Partial Parental Immunity.* Wagner v. Smith, 340 N.W.2d 255 (Iowa 1983) (refusing to extend abrogation to negligent supervision); Turner v. Turner, 304 N.W.2d 786 (Iowa 1981) (negligent tort exception for injuries caused outside area of parental authority and discretion).

16. KANSAS: *Never Adopted Parental Immunity.* Nocktonick v. Nocktonick, 611 P.2d 135 (Kan. 1980) (motor vehicle exception).

17. KENTUCKY: *Partial Parental Immunity.* Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1971) (negligent tort exception).

18. LOUISIANA: *Full Immunity.* LA. REV. STAT. ANN. § 9:571 (West 1991); Section 9:571 was construed in *Bondurant v. Bondurant*, 386 So. 2d 705 (La. Ct. App. 1980) (full immunity for custodial parents).

19. MAINE: *Partial Parental Immunity.* Black v. Solmitz, 409 A.2d 634 (Me. 1979) (motor vehicle exception).

20. MARYLAND: *Full Immunity.* Frye v. Frye, 505 A.2d 826 (Md. 1986) (immunity for negligent torts); Mahnke v. Moore, 77 A.2d 923 (Md. 1951) (nonnegligent tort exception).

21. MASSACHUSETTS: *Partial Parental Immunity.* Soroenson v. Soroenson, 339 N.E.2d 907 (Mass. 1975) (motor vehicle exception); Stamboulis v. Stamboulis, 519 N.E.2d 1299 (Mass. 1988) (negligent tort exception).

22. MICHIGAN: *Partial Parental Immunity.* Wright v. Wright, 351 N.W. 2d 868 (Mich. Ct. App. 1984); Plumley v. Klein, 199 N.W.2d 169 (Mich. 1972) (negligent tort exception).

23. MINNESOTA: *Immunity Totally Abrogated.* Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980) (abolishing immunity completely, adopting a reasonable parent standard). However, the court does not view a claim of negligent supervision by a parent as a valid cause of action.

24. MISSISSIPPI: *Full Immunity.* Rayburn v. Moore, 241 So. 2d 675 (Miss. 1970); Glaskox v. Glaskox, 614 So. 2d 906 (Miss. 1992) (motor vehicle exception).

25. MISSOURI: *Partial Parental Immunity.* Kendall v. Sears, Roebuck & Co., 634 S.W.2d 176 (Mo. 1982) (en banc); Fugate v. Fugate, 582 S.W.2d 663 (Mo.

1979)(en banc); Hartman v. Hartman, 821 S.W.2d 852 (Mo. 1991) (reasonable parent standard).

26. MONTANA: *Never Adopted Parental Immunity.* Transamerica Ins. Co. v. Royle, 656 P.2d 820 (Mont. 1983) (motor vehicle exception).

27. NEBRASKA: *Full Immunity.* Pullen v. Novak, 99 N.W.2d 16 (Neb. 1959) (nonnegligent tort exception).

28. NEVADA: *Never Adopted Parental Immunity.* Rupert v. Stienne, 528 P.2d 1013 (Nev. 1974) (refusing to recognize parental immunity).

29. NEW HAMPSHIRE: *Never Adopted Parental Immunity.* Briere v. Briere, 224 A.2d 588 (N.H. 1966). In 1930, the New Hampshire Supreme Court in *Dunlap v. Dunlap*, 150 A. 905 (N.H. 1930) stated, "The father who brutally assaults his son or outrages his daughter, ought not to be heard to plead his parenthood and the peace of the home as answers to an action seeking compensation for the wrong." New Hampshire refuses to recognize an immunity.

30. NEW JERSEY: *Partial Parental Immunity.* Foldi v. Jefferies, 461 A.2d 1145 (N.J. 1983). The court recognizes actions based on willful, wanton, or intentional misconduct by the parent. No immunity for nonnegligent supervision. France v. A.P.A. Transp. Corp., 267 A.2d 490 (N.J. 1970) (motor vehicle exception).

31. NEW MEXICO: *Immunity Totally Abrogated.* Guess v. Gulf Ins. Co., 627 P.2d 869 (N.M. 1981).

32. NEW YORK: *Immunity Totally Abrogated.* Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974). However, the court does not recognize a claim of negligent supervision by a parent as a valid cause of action. The New York Court of Appeals held that when parent-child immunity was abrogated, the result was to restore suits, "which would previously have been actionable between parties absent the family relationship." *Id.* at 342.

33. NORTH CAROLINA: *Partial Parental Immunity.* N.C. GEN. STAT § 1-539.21 (1992) (motor vehicle exception); Doe v. Holt, 418 S.E.2d 511 (N.C. 1992) (nonnegligent tort exception); Lee v. Mowett Sales Co., 342 S.E.2d 882 (N.C. 1986) (immunity for negligent torts).

34. NORTH DAKOTA: *Immunity Totally Abrogated.* Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967) (construing N.D. CENT. CODE §§ 9-10-06, 14-09-19 to allow suits between parents and children).

35. OHIO: *Immunity Totally Abrogated.* Kirschner v. Crystal, 474 N.E.2d. 275 (Ohio 1984).

36. OKLAHOMA: *Partial Parental Immunity.* Sixkiller v. Summers, 680 P.2d 160 (Okla. 1984) (immunity for negligent supervision); Unah v. Martin, 676 P.2d 1366 (Okla. 1984) (motor vehicle exception); Wooden v. Hale, 426 P.2d 679 (Okla. 1967) (court recognizes nonnegligent tort exception in *dicta*). This jurisdiction allows cause of action based on willful, wanton, or intentional misconduct by the parent.

37. OREGON: *Immunity Totally Abrogated.* Winn v. Gilroy, 681 P.2d 776 (Or. 1984) (Restatement view); Cowgill v. Boock, 218 P.2d 445 (Or. 1950) (abrogating parental immunity for tortuous, but not privileged, parental acts that injure the child).

38. PENNSYLVANIA: *Immunity Totally Abrogated.* Falco v. Pados, 282 A.2d 351 (Pa. 1971).

39. RHODE ISLAND: *Partial Parental Immunity.* Silva v. Silva, 446 A.2d 1013 (R.I. 1982) (motor vehicle exception).

40. SOUTH CAROLINA: *Immunity Totally Abrogated.* Elam v. Elam, 268 S.E.2d 109 (S.C. 1980) (statutory motor vehicle exception unconstitutional; immunity abrogated completely).

41. SOUTH DAKOTA: *Never Adopted Parental Immunity.* Neither the judicial nor the legislative branches have addressed the doctrine as it applies in this state.

42. TENNESSEE: *Partial Immunity.* Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994).

43. TEXAS: *Partial Parental Immunity.* Jilani v. Jilani, 767 S.W.2d 671 (Tex. 1988) (motor vehicle exception); Felderhoff v. Felderhoff, 473 S.W.2d 928 (Tex. 1971) (negligent tort exception).

44. UTAH: *Never Adopted Parental Immunity.* Elkington v. Foust, 618 P.2d 37 (Utah 1980) (refusing to recognize parental immunity).

45. VERMONT: *Never Adopted Parental Immunity.* Wood v. Wood, 370 A.2d 191 (Vt. 1977) (refusing to recognize parental immunity).

46. VIRGINIA: *Partial Parental Immunity.* Wright v. Wright, 191 S.E.2d 223 (Va. 1972) (immunity for negligent torts incident to parental relationship); Smith v. Kauffman, 183 S.E.2d 190 (Va. 1971) (motor vehicle exception).

47. WASHINGTON: *Full Immunity.* Talarico v. Foremost Ins. Co., 712 P.2d. 294 (Wash. 1986) (en banc). Exception: intentional, willful, or wanton conduct by the parent. Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 713 P.2d 79 (Wash. 1986) (en banc) (nonnegligent tort exception; immunity for negligent torts and failure to supervise); Merrick v. Sutterlin, 610 P.2d 891 (Wash. 1980) (motor vehicle exception).

48. WEST VIRGINIA: *Partial Parental Immunity.* Courtney v. Courtney, 413 S.E.2d 418 (W. Va. 1991) (nonnegligent tort exception; immunity for reasonable corporal punishment); Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976) (motor vehicle exception).

49. WISCONSIN: *Partial Parental Immunity.* Goller v. White, 122 N.E.2d 193 (Wis. 1963) (immunity abrogated for negligent torts with two exceptions: exercise of reasonable parental authority and exercise of care and necessities).

50. WYOMING: *Partial Parental Immunity.* Allstate Ins. Co. v. Wyoming Ins. Dept., 672 P.2d 810 (Wyo. 1983); Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992) (motor vehicle exception); Oldman v. Bartshe, 480 P.2d 99 (Wyo. 1971) (nonnegligent tort exception).

51. DISTRICT OF COLUMBIA: *No Immunity.* Rousey v. Rousey, 528 A.2d 416 (D.C. 1987) (en banc) (rejected immunity and adopted Restatement view).